Field Family Associates, LLC d/b/a Hampton Inn NY—JFK Airport and New York Hotel and Motel Trades Council. Case 29-CA-26729

August 31, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On June 28, 2005, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The principal issues in this case are: (1) whether the Respondent was aware of a Union campaign among the subject employees at the time that it made its promise of an increase in benefits; (2) if the Respondent was not so aware, did it violate Section 8(a)(1) of the Act by promising new benefits in anticipation of a union organizing campaign among these employees.[1] We find that the Respondent lacked knowledge that the Union had begun organizing efforts among the subject employees when the benefits were promised. We also conclude that the Respondent did not violate the Act by making the promises even if it thought that such a campaign might begin at some point in the future.[2]

A. Factual background

The Field family organization owns seven hotels, including the Crowne Plaza at La Guardia Airport, the Hampton Inn NY-JFK Airport, and the Holiday Inn NY-JFK Airport. The New York Hotel and Motel Trades Council (the Union) began organizing Crowne Plaza employees in March or April and won the representation election held there on May 13, 2004.[3]

In late April, the Respondent contracted with labor relations specialist Quentin Nelson to meet with employees at the two JFK hotels, where there had not yet been any union activity. Vice President of Human Resources Chris Polityka testified that the JFK hotels lacked adequate human resources management and that he wanted to improve employee relations by hearing about and addressing employee concerns. The Respondent conceded that *its* concerns included the ongoing organizing drive at the Crowne Plaza and the possibility that the Union would commence organizing among the JFK employees at some point in the future.

From May 3 through 5, Nelson met with JFK employees in small group meetings during which he asked about their concerns and showed a video about unionization. Employees shared numerous complaints, which Nelson in turn shared with the Respondent's management in an initial report on May 5 and in an e-mail on or about May 7. Later in May, the Union contacted several JFK employees at their homes and arranged meetings at the Radisson Hotel from May 20 to 22. The Radisson was nearby the JFK hotels, and numerous employees walked to the meetings there after work.

On May 25, at a joint meeting with employees of both JFK hotels, the Respondent's Vice President Isenberg promised wage increases and other benefits based on the concerns that employees shared with Nelson earlier that month.[4] The changes were to take effect almost immediately, starting on or before June 1. During the question-and-answer session that followed the meeting, some employees began to chant "union, union." The Respondent's witnesses Polityka and Holiday Inn General Manager Mark Lesser testified without contradiction that this was their first indication that the Union was attempting to organize JFK employees. On May 28, the Union filed a representation petition for the employees at the JFK hotels. In early June, the Respondent notified employees in a letter that implementation of the wage increases and other benefits would be delayed pending the outcome of the election to avoid the appearance that the Respondent was attempting to unlawfully influence employees in their decision.

[1] This issue is identical to one in a related case, *Holiday Inn NY-JFK Airport*, 348 NLRB 1 (2006), which was heard at the same time but not consolidated with this case.

[2] We adopt the judge's finding, for the reasons stated by him, that the Respondent violated Sec. 8(a)(1) in July 2004 by verbally warning employee Jessie Morris that she would be subject to discipline for bringing union literature into the employee cafeteria.

[3] All dates are in 2004.

[4] The promised wage increases and other benefits included the following: All new hires who had not yet received a $1 increase after 90 days would be paid the increase; any employee who had worked overtime and not been properly paid would be paid the correct amount after an audit; seniority would determine work schedules, days off, vacation, and holiday time; wage increases would be announced on or before June 1 and become effective as of that date; and the company would reinstall the program of matching up to 6% of the employees' contributions to the 401(k) plan.

B. The judge's decision

The judge concluded that the Respondent's May 25 promise of wage increases and other benefits violated Section 8(a)(1), finding that:

> Whether or not the Employer was specifically aware, as of May 25, that the Union had begun its organizational efforts at the Hampton and Holiday Inns, there is no question that management correctly anticipated that the Union would shortly commence to organize the two JFK hotels. The promises were clearly made in anticipation of a petition being filed by the Union and in my opinion they clearly were intended to deter employees from supporting the Union.

The judge also found it "probable" that the Respondent knew "something was going on" when it promised the wage increases and other benefits, although the only affirmative evidence indicates that the Respondent lacked such knowledge.[5]

C. Analysis

The General Counsel has not established that the Respondent knew of a Union campaign when the Respondent made its promises. Nor is the judge's finding that it was "probable" that management knew "something was going on" borne out by the record. In fact, the only affirmative evidence is to the contrary. Management representatives Polityka and Lesser testified without contradiction that their first indication of union activity at the JFK hotels came at the May 25 meeting when some employees chanted for the Union after the Respondent promised the wage increases and other benefits. Not even all of the employees knew about the Union at this time; employee Teresa Felix testified that she did not know about the Union until after the May 25 meeting. There was no evidence that Union literature had been distributed in the hotel. There was no testimony that anyone had notified management of the Union meetings at the Radisson Hotel, nor was there other evidence of management knowledge prior to May 25.

The judge speculated that management would have noticed the number of employees going to the Radisson Hotel for the offsite meetings during May 20 through 22. However, there is no testimony that the comings and goings of employees during their non-work time on these days were any different from those of any other day, or that the Respondent paid any attention to its employees' off-hour movements. In sum, the judge's speculation about the Respondent's knowledge does not substitute for the required proof.

We now turn to the second issue: Whether the Respondent violated Section 8(a)(1) of the Act by promising increased wages and benefits in anticipation of a union organizing campaign.

In *NLRB v. Exchange Parts*, 375 U.S. 405, 409 (1964), the Supreme Court held that "the conferral of employee benefits while a representation election is pending, for the purpose of inducing employees to vote against the union," interferes with the employees' protected right to organize. While an election was imminent in that case, the rule set out in *Exchange Parts* is also applicable to promises or conferral of benefits during an organizational campaign but before a representation petition has been filed. E.g., *Curwood Inc.*, 339 NLRB 1137, 1147-1148 (2003) enfd. in pertinent part 397 F.3d 548, 553-54 (7th Cir. 2005) (holding that a pre-petition announcement and promise to improve pension benefits violated Section 8(a)(1) where the respondent was reacting to knowledge of union activity among its employees).

The Respondent here admits that concerns about a potential union organizational campaign among its employees motivated the announcement of new benefits. However, it contends that it could not have had the unlawful purpose under *Exchange Parts* of interfering with employees' organizational rights because it acted before knowing that the Union's campaign had commenced among the Respondent's employees.

Where it cannot be established that the employer knew of union activity, the Board has not found unlawful the grant or announcement of economic benefits. Thus, in *Norfolk Livestock Sales*, 158 NLRB 1595, 1595 (1966), the Board held that the respondent's improved vacation plan did not violate Section 8(a)(1) because the record did not establish that at the time the vacation plan was announced the respondent was aware of union activity among its employees. Similarly, in *Sigo Corp.*, 146 NLRB 1484, 1486 (1964), the respondent's announcement of a new insurance plan days after the union withdrew its election petition did not violate the Act, as the respondent could reasonably assume (albeit incorrectly) that no union was actively organizing, and there was no showing that the employer's announcement was intended to interfere with employees' Section 7 rights.

[5] In addition, the judge viewed the Respondent's June letter delaying implementation of its promises as an attempt to blame the Union for the failure to grant the wage increases and other benefits. He deemed the letter, together with the promised benefits, to be a "violation of the law." However, the General Counsel did not allege that the letter or delay in implementation violated the Act, and we therefore disavow the judge's comments to the contrary. The judge also found the letter was not a legitimate disavowal of the May 25 promises, under *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). In light of our decision finding no violation in the Respondent's promises, we find it unnecessary to address the judge's *Passavant* discussion.

It is not unlawful for a nonunion employer to improve working conditions in an attempt to reduce the general appeal of unionization when no union is actively organizing. In this respect, we agree with the First Circuit's observations in *NLRB v. Gotham Indus., Inc*., 406 F.2d 1306, 1310 (1st Cir. 1969):

> Passing the exceptional employer who may raise wages out of fraternal generosity, we suppose that most nonunion employers give raises for one or both of two reasons: to keep employees, old and new, in the plant, and to keep unions out. As to the latter it cannot be that every time it can be shown that an employer was seeking to stay one step ahead of unionization he was guilty of an unfair labor practice; the situation must have sufficiently crystallized so that some specific orientation exists. It would be a sorry consequence if the Labor Relations Act were to be construed as causing every nonunionized employer to think twice before initiating a wage increase lest some union should appear and claim that it had been frustrated. … At a minimum it must be that to establish improper motivation requires a showing that an employer knows or has knowledge of facts reasonably indicating that a union is actively seeking to organize, or else that an election is, to use the Board's word, impending.

Thus, to find an employer's promise of economic benefits unlawful, the Board must focus on whether the respondent intended to interfere with actual union organizational activity among its employees, rather than whether the respondent wanted to stay "one step ahead" of the union by diminishing the appeal of unionization. If, as the judge held, correctly anticipating union activity was sufficient to establish an 8(a)(1) violation, the result would effectively prohibit nonunion employers from improving working conditions in hopes of diminishing the appeal of unionization generally, even when no union is present and where employees have not shown any desire to bring a union onto the scene. In sum, the judge's reasoning that it is unlawful to promise a wage increase and other benefits in anticipation of possible union activity conflicts with the law.

Our dissenting colleague effectively concedes that our dismissal of the 8(a)(1) allegation here is consistent with Board precedent. She would overrule that precedent and substitute the following test: "An employer violates Section 8(a)(1) by promising a benefit when: (1) the employer is motivated by a desire to prevent employees from unionizing; (2) organizing activity is in fact under way; and (3) the employees reasonably would perceive a connection between the employer's promise of benefits and their protected activity."

Significantly, the second element of the above test does not depend on whether the employer is *aware* of the union activity. Indeed, in the instant case, the employer was not aware of the activity. Thus, although our dissenting colleague says that an employer may lawfully seek to stay "one step ahead" of any possible union campaign, she effectively takes away that lawful stratagem by condemning the employer's action based on facts of which the employer is unaware. The right to make that lawful entrepreneurial choice is effectively chilled because the employer is made to act at its peril. In addition, our colleague's approach means that an employer that honestly wishes to conform to the law will find itself in violation of law because of facts that it does not know.

The dissent also places the employer on the horns of a dilemma. If the employer grants the benefit before knowledge of the union campaign, it faces liability if there is in fact a campaign. And, if it waits until after acquiring knowledge of the campaign, it risks liability under *Exchange Parts*. We do not believe that the Act is intended to hamstring employers in this way. Indeed, that it why the law has developed as it has. Unlike our colleague, we would not change that law.

We do not view our analysis as exalting form over substance as asserted by the dissent. *Exchange Parts* focused on "the danger inherent in well-timed increases in benefits." 375 U.S. at 409. To be "well-timed," a promise of benefits must be more than coincidentally made after organizing has commenced; it must be made in specific response to organizing.[6] Consequently, employer knowledge of union activity is an essential element of this 8(a)(1) violation. Thus, the law makes a clear and appropriate demarcation between a general desire to remain nonunion and a specific intent to interfere with an ongoing campaign. Because the General Counsel did not establish that the Respondent knew of the organizational activity at the Hampton Inn NY-JFK Airport at the time of the May 25 meeting, we find that the Respondent's promise of wage increases and other benefits did not interfere with employee's Section 7 rights in violation of Section 8(a)(1) of the Act.[7]

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[6] Contrary to the dissent, the Supreme Court established in *Exchange Parts* that the Sec. 8(a)(1) violation in this situation is motive-based and thus requires employer knowledge.

[7] Member Schaumber notes that his dissenting colleague's test would essentially create a gray area for nonunion employers in heavily unionized industries or industries targeted for organizing. Such employers, who may reasonably anticipate organizing at any time, would act at their peril whenever they improved wages and benefits, whether they were acceding to employee demands or simply improving terms and conditions of employment. They would essentially be compelled to

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Field Family Associates, LLC d/b/a Hampton Inn NY-JFK Airport, New York, N.Y., its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(a) and reletter the subsequent paragraphs.

2. Substitute the attached Notice for that of the administrative law judge.

Dated, Washington, D.C. August 31, 2006

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

In putting form over substance, the majority finds that the Respondent's promise of benefits was not unlawful, because the General Counsel failed to prove that the Respondent knew that an anticipated union-organizing campaign was already underway. But the majority's employer-knowledge requirement makes no sense here, given the Act's goal of protecting employees' right freely to choose whether to have union representation. So long as the employer's purpose is to forestall union- organizing activity, organizing activity is in fact under way, and employees reasonably would perceive that the employer's promise of benefits was intended to discourage unionization, the promise should be found unlawful, consistent with the Supreme Court's decision in *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1963).[1]

I.

The facts are straightforward. The Respondent owns three hotels in the New York City area. The Union mounted a successful organizing campaign at the Respondent's Crown Plaza Hotel. While this campaign was pending the Respondent hired a labor relations consultant who, along with the Respondent's managers, discussed the Union's organizing efforts at the Crown Plaza and the likelihood that the Union would soon start organizing the Respondent's other two hotels, the Hampton Inn NY JFK Airport and the Holiday Inn NY JFK Airport. The Respondent then embarked on a campaign designed to influence the employees against unionization. The labor relations consultant held a series of meetings with the employees at the Hampton Inn and the Holiday Inn, asking them what their concerns were and what they would like to see changed. In addition, the consultant showed each group of employees a video involving union organizing. The consultant specifically reported to the Respondent that, among other things, the employees were unhappy with the Respondent's failure to increase wages.

The Respondent was correct to anticipate the Union's desire to organize its other two hotels. The Union's initial meetings with the Respondent's employees took place on May 20, 21, and 22, 2004 at the Radisson Hotel, down the street from the Hampton Inn. Many employees walked to the Radisson after work, and during those meetings the Union solicited employees to sign authorization cards.

On May 25, immediately after the Union meetings, the Respondent held a meeting with its employees, and announced a series of wage increases to take affect the following month. At some point during the meeting, some of the employees began chanting that they wanted the Union. The Respondent asserts that this was the first time it became aware that its Hampton Inn employees were seeking union representation.

II.

In *Exchange Parts*, supra, the Supreme Court explained how a promise (or grant) of benefits interferes with employees' Section 7 rights:

> The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

act as though a union were perpetually on the scene (until they knew a campaign was under way, at which point they would have to act as though the union were *not* on the scene). Furthermore, because an employer is precluded from querying workers about whether union organizing has commenced, it has few if any options for learning whether a union campaign is under way. Moreover, it is entirely unnecessary to put the burden that the dissent does on employers in order to protect employee free choice. If a union is concerned that an employer will improve working conditions during the nascent days of a campaign, the union may make its presence known at any time and thus possibly preclude the employer from improving benefits for the duration of the campaign.

[1] I join the majority in adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by warning employee Jessie Morris that she would be subject to discipline for bringing union literature into the employee cafeteria.

375 U.S. at 409. That the benefits are not conditioned upon voting against the union is not controlling, if the employer's purpose is one of "impinging upon ... freedom of choice for or against and is reasonably calculated to have that effect." *Id*.

The Supreme Court's approach focuses on the employer's purpose and on the impact of the employer's conduct on the employees. The interference that employees suffer when they hear the promise of benefit does not depend on what the employer knows. [2] It hinges on what they reasonably think the employer knows. If employees reasonably think that their employer knows of their organizing, then the promise of benefit will tend to interfere with that activity.[3] As for the employer's purpose, it also does not depend on knowledge of actual organizing activity: the anticipation of organizing obviously can be enough to motivate the employer.

As long as the employer's promise of benefits was motivated by a desire to prevent unionization, and its employees have engaged in organizing activities, the employer's knowledge that the organizing campaign has already commenced should be immaterial.

Consequently, I would find that an employer violates Section 8(a)(1) by promising a benefit when: (1) the employer is motivated by a desire to prevent employees from unionizing; (2) organizing activity is in fact under way; and (3) the employees reasonably would perceive a connection between the employer's promise of benefits and their protected activity.[4]

The majority criticizes the test that I propose, asserting that an employer's "lawful entrepreneurial choice" to grant benefits to employees to dissuade them from organizing is "effectively chilled because the employer is made to act at its peril."[5] Of course, limitations on "entrepreneurial choice" are inherent in much social legislation regulating business, including the National Labor Relations Act and its protection of employee freedom of choice from employer interference. Here, that paramount statutory aim is given too little weight by the majority. Moreover, the majority overestimates the "peril" facing employers under my test, by focusing entirely on the fact that it would not require a showing of actual employer knowledge of organizing activity. My test incorporates three elements: employer motive, actual organizing, and employees' reasonable perception of employer action. It will be the unusual case—like this one, where the employer knew that organizing activity was imminent—in which all three elements are satisfied. Thus, it seems highly unlikely that many employers will be chilled from taking actions that do *not* actually interfere with employee free choice, for fear of risking unfair-labor-practice liability.

III.

That test was satisfied here. First, the Respondent was clearly motivated by the desire to prevent its employees from unionizing. The Respondent hired a "labor relations consultant" to solicit employee complaints and show them an anti-union video. As the majority points out, the Respondent conceded that its concerns included not only the ongoing organizing drive at the Crown Plaza, but also the possibility that the Union would commence organizing among its employees at the Hampton Inn and Holiday Inn in the near future. I therefore agree with the judge that the Respondent engaged in a course of conduct intended to deter employees from seeking union representation.

Second, the employees were in fact engaged in an active union organizing campaign at the Hampton Inn on May 25, the date that the Respondent promised them a series of wage increases.

Third, based on the coincidence of the Respondent's anti-union campaign and the Union's organizing campaign, the employees would reasonably perceive a connection between the Respondent's promise of wage increases and their protected activity. Reasonable employees would think that the Respondent knew of their organizing activities and promised the benefit to dissuade them from supporting the Union. Thus, regardless of whether the Respondent knew exactly how far the Union's organizing campaign had progressed, its promise reasonably would tend to interfere with the employees' union activities. Therefore, the Respondent violated Section 8(a)(1).

IV.

Although under the facts presented here I would find that Section 8(a)(1) has been violated, my approach would not automatically preclude an employer from "staying one step ahead" of the union by improving employees' terms and conditions of employment for the

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[2] See, e.g., *Meijer, Inc*., 344 NLRB No. 115, slip op. at 2 (2005)(employer knowledge of union activity is not necessary element of Sec. 8(a)(1) violation), enf. denied, ____F.2d ____, Nos. 05-1951/2025 (6th Cir. Aug. 21, 2006). In this respect, Sec. 8(a)(1) violations are distinct from Sec. 8(a)(3) violations, which involve employer discrimination.

[3] See *Ewing v. NLRB*, 861 F.2d 353, 362 (2d. Cir. 1988). ("The key element in a chilling effect analysis should be the impact on employees.").

[4] To the extent that *Norfolk Livestock Sales*, 158 NLRB 1595 (1966), and *Sigo Corp*., 146 NLRB 1484 (1964), cited by the majority, are inconsistent with this test, I would overrule those decisions.

[5] Member Schaumber goes further in asserting that under my test, employers in "heavily unionized industries or industries targeted for organizing ... essentially would be compelled to act as though a union were perpetually on the scene."

purpose of forestalling unionization. Rather, an employer would run afoul of Section 8(a)(1) only where it announces improved benefits in order to discourage unionization, an organizing campaign is in fact underway, and the employees reasonably would perceive that there is a connection between the announcement of benefits and the union organizing campaign. Thus, this approach would permit employers to promise benefits in the vast majority of cases, where no union activity has commenced. My approach, consistent with *Exchange Parts*, strikes a better balance between employers' interest in legitimately forestalling unionization and the Act's interest in protecting employee free choice. Accordingly, I dissent.

Dated, Washington, D.C. August 31, 2006

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT warn our employees that they will be subject to discipline because they bring union literature into the employee cafeteria or any other non-working areas.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

FIELD FAMILY ASSOCIATES, LLC
D/B/A HAMPTON INN NY-JFK AIRPORT

Sharon Chau, Esq., for the General Counsel
Andrew S. Hoffmann, Esq., for the Respondent
Jane Lauer-Barker, Esq., for the Union

DECISION

STATEMENT OF THE CASE

Raymond P. Green, Administrative Law Judge. I heard this case on various days in March and April, 2005.[1]

The charge was filed on January 11, 2005 and the Complaint was issued on January 18, 2005. In substance, the Complaint alleged:

1. That on or about May 25, 2004, the Respondent, by Gary Isenberg, its executive vice president of operations, in an effort to dissuade employees from supporting the Union, promised employees (a) a wage increase, (b) the reinstatement of a matching percent contribution to their 401(k) plans and (c) other unspecified improvements in their working conditions.

2. That in early July 2004, the Respondent, for discriminatory reasons, issued a verbal warning to Jessie Morris.

Based on the entire record, including my observations of the demeanor of the witnesses and after considering the arguments of counsel, I hereby make the following

Findings and Conclusions

I. JURISDICTION

The parties agree and I find that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Field family organization owns seven hotels, four in Philadelphia and three in New York. The three New York hotels are the Crown Plaza at LaGuardia airport, and the Holiday Inn and Hampton Inn at JFK airport.

In March or April 2004, the Union commenced an organizing drive amongst the employees of the Crowne Plaza Hotel. A petition was filed by the Union in relation to the employees at the Crowne Plaza and an election was held on May 13, 2004. The Union won that election and ultimately was certified as the exclusive collective-bargaining representative.

At the time that the election at the Crowne Plaza was still pending, the Respondent, in April 2004, engaged Quentin Nelson, a labor relations consultant who along with Respondent's

[1] This case was scheduled to be heard in conjunction with another Consolidated Complaint involving a related hotel, (the Holiday Inn), commonly owed with the Hampton Inn. Nevertheless, this case was never officially consolidated with the others and as the issues here are much simpler, I think that it is not necessary to wait before issuing a Decision.

managers, Chris Polityka[2] and Gary Isenberg,[3] discussed the Union's organizing effort at the Crowne Plaza and the likelihood that the Union would soon commence organizing at the Respondent's JFK airport hotels. Nelson suggested and the Respondent's managers approved an "employee relations audit." The plan was that Nelson would hold a series of meetings with the employees and ask them what there concerns were and what they would like to see changed.

On April 28, 2004, Christopher Polityka, the Corporate Director of Human Resources sent a letter to the employees stating:

> Last June, we announced a change in our 401k matching contribution for the Airport Hospitality 401k Plan from a dollar for dollar match up to 6%... to a dollar for dollar match up to 3%. . . In our FAQ's sheet on our 401k program dated June 30, 2003, we stated, "this match will be re-evaluated annually based upon business and economic circumstances." With the one-year anniversary of this change approaching, we wanted to assure each of you that the current dollar for dollar match is being revaluated for 2004/2005.

On May 3, 4, and 5, 2004, Nelson conducted a series of meetings with the employees of both JFK hotels. He asked them what their problems were and was told that the major issues were the way employees were being treated by some of the supervisors; the cutback that had previously been made in contributions to the 401(k) pension plan; and the failure of the company to give wage increases. In addition, Nelson showed each group of employees a video concerning unionization. (There is, therefore, no question but that this survey was directly linked to the issue of unionization).

Nelson used an intriguing term to refer to this set of meetings; describing them as a means of "ventilating the work force." By whatever name, it is clear that this activity was intended, in essence, as a prophylactic measure, designed to influence the employees against unionization if and when, the Union started to organize at the two JFK hotels.

Nelson made his initial report to the Respondent on or about May 5, and went out to California to do some consulting work for another Company that was involved in a union organizing campaign. On or about May 7, 2004, Nelson sent by e-mail, a list of the employees' concerns and complaints. (The Respondent could not locate or retrieve this e-mail message).

The Union's initial meetings in 2004 with the employees of the two JFK hotels took place on May 20, 21, 22, 2004 at the Radisson Hotel, which is right down the street. During that period of time, numerous employees walked over to the Radisson after work and the Union solicited employees to sign authorization cards. Given the number of people who attended these meetings, it is probable that the Respondent's management was aware that something was going on.

On May 25, 2004, the Company held a meeting with its employees from the two JFK hotels and announced a group of promises. These are reflected in General Counsel Exhibit 14 and include the following:

1. That all new hires who hadn't yet received a $1.00 increase after 90 days would be paid the increase on June 10, 2004.

2. That any employee who had worked overtime and had not gotten properly paid would, after an audit, be paid the correct amount on June 17.

3. That effective June 1, 2004, seniority would determine work schedules, days off, vacation and holiday time.

4. That wage increases would be announced on or before June 1 and become effective as of that date.

5. That the company would be re-installing, as of June 15, 2004, the program of matching up to 6% of the employees' contribution to the 401(k) plan.

At some point during the meeting on May 25, some of the employees began chanting that they wanted the Union. According to Respondent's witnesses, this was the first time that they had any knowledge of the Union's organizing efforts at the JFK hotels. But this is not likely and it nevertheless was conceded that at least a month earlier, management already had anticipated this union effort and had hired Quentin Nelson to help deal with it.

On May 28, 2004, 3 days after the May 25 meeting, the Union filed its original petition in 29–RC–10220. That petition asked for an election to be conducted in a combined unit of the two JFK hotels. The petition was later withdrawn on June 15, 2004, because the parties agreed that there should be two separate voting/bargaining units. Two new petitions were then filed and elections were held on August 12 and 13, 2005.[4]

In early June 2004, the Respondent sent another letter to the employees, this time taking back the promises that it had made on May 25. The letter stated:

> I have met with several of you over the past two weeks and have indicated as of June 1st that we would restore the 6% matching benefits under the 401K plan and we would increase your wages. . . .
>
> On late Friday afternoon, May 28, 2004 we received notice that the Hotel and Motel Trades Council planned to file a petition with the National Labor Relations Board seeking a secret ballot election to determine whether that union would have the right to represent associates employed by the Hampton Inn and the Holiday Inn. . . . As a result of the NLRB's processing of that petition, implementation of the wage increases and other changes we had announced would go into effect on Tuesday, June 1, will be delayed.
>
> We have been advised that the law does not permit us to make the indicated changes in your wages, fringe benefits and other working conditions during the period prior to the election. If we did so, we would be accused of "bribing" associates in order to influence the outcome of the election. Accordingly, we must postpone making any of these changes. We are doing so

[2] Vice President of Human Resources.

[3] Vice President of operations.

[4] On June 2005, I issued a Decision on Objections in Case Nos. 2–RC–10237 and 2–RC–10238, JD(NY)-24-05), where I recommended that the Employer's Objections be overruled and that Certifications of Representative be issued to the Union.

> for the sole purpose of avoiding the appearance that we were trying to influence either your decision on whether to support the union or the election's outcome. While it is our intention to make these changes, regardless of the outcome of the election, the collective bargaining process (if the union is voted in) may affect our ability to do so.
>
> We will notify you if, and when, the NLRB schedules an election. Between now and then, you will have to decide for yourself whether you are bettor off with or without a union. This will be one of the most important decisions you will ever be asked to make. I hope, after considering all of the facts, you will make what we believe is the right decision and choose to remain union free. I want to make my position crystal clear to you: I am strongly opposed to a union in our hotel.

In relation to the Hampton Inn, the only other incident that is alleged to be a violation of the Act occurred in early July 2004. Jessie Morris testified that she carried a bunch of union flyers into the employee cafeteria and put them down on a table. She testified without contradiction that later in the day, her manager, Jennifer Cluden, called her into the office and asked if she had been distributing flyers. Morris said that she did not and that Cluden told her that if she distributed leaflets in the hotel she would receive a written warning. In this regard, I note that the employee handbook has a no solicitation/no distribution rule that states:

> Solicitation on the Hotel premises or distribution of literature of any type is not permitted by non-hotel associates. Hotel associates are not permitted to solicit during their, or the solicited associate's working time. Hotel associates also are not permitted to distribute literature during working time or in working areas for any purpose.

III. ANALYSIS

The Respondent argues that the promises it made at the meetings on May 25, 2004 were lawful because they were made prior to the time that the Union filed a petition for an election and prior to the time that the Employer became aware of the Union's attempt to organize the employees at the two JFK airport hotels. In this regard, the Respondent relies on a whole series of cases wherein the Board and the Courts have held that in the absence of an explicitly stated quid pro quo, the Board will presume that a promise or grant of benefit made during a union's organizing campaign or after an election petition has been filed will be presumed to be intended to influence the potential voters in an NLRB election. *NLRB v. Exchange Parts Co*., 375 U.S. 405 (l964); *Baltimore Catering Co*., 148 NLRB 970 (l964); *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1344 (2000); *B & D Plastics*, 302 NLRB 245 (1991); *Speco Corp*., 298 NLRB 439, 443 (1990). This presumption of illegal interference can of course be rebutted if the Employer can establish a legitimate explanation for the timing of the grant of benefits and this usually consists of evidence that they were part of an existing practice or that they were planned beforehand.

But one need not look at the timing of the promises in this particular case in order to show a presumption that the Respondent's intent was to influence its employees regarding their union support.

The evidence unequivocally shows that the Respondent hired Quentin Nelson, a labor consultant in April, because it was already engaged in an election campaign involving this same union at the Crowne Plaza Hotel. It is admitted that when Nelson discussed this situation with Respondent's management, they agreed that the Union would likely extend its campaign to the JFK airports and that to meet this issue, the Respondent, through Nelson, would solicit employee complaints which would then be remedied. And this is precisely what happened.

During a 3-day period at the outset of May 2004, Nelson canvassed the employees at the two JFK hotels and asked them what their complaints were. While at it, he also showed them a short video about unions. The employees responded and Nelson drew up a list of complaints and issues that he e-mailed to management around May 7. This in turn, generated a series of management meetings where the Company decided to remedy many of the employee complaints, including reinstating the old rate of payments to the 401K plan and the granting of wage increases effective on June 1.

Mr. Nelson called this entire exercise an example of "ventilating the work force." I would call it a course of conduct intended to deter employees from seeking union representation. Whether or not the Employer was specifically aware, as of May 25, that the Union had begun its organizational efforts at the Hampton and Holiday Inns, there is no question that management correctly anticipated that the Union would shortly commence to organize the two JFK hotels. The promises were clearly made in anticipation of a petition being filed by the Union and in my opinion they clearly were intended to deter employees from supporting the Union.

What is even cleverer is that once the Union did file its petition, the Respondent sent a letter to its employees telling them that because of the petition, it had to delay implementation of its promises because otherwise it could be accused of "bribing" them. Well it already had bribed them in anticipation of a petition being filed, and its "retraction" could now serve as the means to blame the Union for its failure to grant the wage increases and other benefits that had already promised. This, in my opinion was too clever by half and an example of someone wanting to have his cake, while eating it. Having decided to promise benefits in anticipation of the Union filing a petition, the Employer could then tell the employees that they were not going to get the promises because the Union filed the petition. Some might call this clever. I call it a violation of the law.[5]

I also conclude that the Respondent violated the Act when it warned Ms. Harris in early July. Notwithstanding the existence of a no distribution rule valid on its face, the facts here show that Harris simply brought a bunch of union flyers into the employee cafeteria, a nonwork area, and left them on a table. She did not distribute this literature during work hours or in work areas. The warning therefore was too broad and interfered with

[5] In my opinion the June letter to the employees, in these circumstances cannot be construed as a legitimate disavowal. Cf. *Passavant Memorial Area Hospital* 237 NLRB 138 (1978).

employees' rights to engage in appropriate union activity during nonwork time, in nonwork areas. *Willamette Industries*, 306 NLRB 1010, 1017 (1992); *Orval Kent Food Co*., 278 NLRB 402, 407 (1986); and *Teletech Holdings, Inc.*, 333 NLRB 402, 403 (2001).

CONCLUSIONS OF LAW

1. The Respondent, Field Family Associates, LLC d/b/a Hampton Inn NY—JFK Airport, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. New York Hotel and Motel Trades Council, is a labor organization within the meaning of Section 2(5) of the Act.

3. By promising wage increases and other benefits with the intention of dissuading employees from voting for or supporting the Union, the Respondent violated Section 8(a)(1) of the Act.

4. By warning an employee that she would be subject to discipline because she brought union literature into the employee cafeteria, the Respondent violated Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Because many of the employees speak Spanish, I shall recommend that the Notice be in English and Spanish.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[6]

ORDER

The Respondent, Field Family Associates, LLC d/b/a Hampton Inn NY—JFK Airport, its officers, agents, successors, and assigns, shall

1. Cease and Desist from

(a) Promising wage increases and other benefits with the intention of dissuading employees from voting for or supporting the Union.

(b) Warning employees that they would be subject to discipline because they bring union literature into the employee cafeteria or in any other nonworking area.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action that is necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in New York, copies of the attached notice in English and Spanish, marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, or sold the business or the facilities involved herein, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since May 25, 2004.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 28, 2005

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT promise wage increases and other benefits with the intention of dissuading our employees from voting for or supporting the New York Hotel and Motel Trades Council.

WE WILL NOT warning our employees that they would be subject to discipline because they bring union literature into the employee cafeteria or in any other non-working areas.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

FIELD FAMILY ASSOCIATES, LLC D/B/A/ HAMPTON INN NY–JFK AIRPORT

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."